## BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

| J. BURKE POLLACK Claimant  |                         |
|--|-------------------------|
| VS.  | )<br>Docket No. 205,357 |
| SERVICE TODAY, INC. Respondent                                   | ) Docket No. 205,557    |
| AND  |                         |
| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Insurance Carrier |                         |

## ORDER

Claimant appeals from an Order entered by Administrative Law Judge Alvin E. Witwer, dated October 24, 1995, that denied claimant's request for preliminary benefits.

#### ISSUES

Administrative Law Judge Alvin E. Witwer denied claimant's request for preliminary benefits finding that claimant failed to give notice of his work-related accident as required by K.S.A. 44-520. This is the single issue for Appeals Board review.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue of timely notice is a jurisdictional issue that grants Appeals Board review of a preliminary hearing order. See K.S.A. 44-534a(a)(2).

Claimant alleged that he injured his back, neck and right shoulder on January 29, 1995 while carrying a crate with his supervisor, Troy Malone. Claimant claims he notified Mr. Malone of these injuries on January 29, 1995 in person and again on January 30, 1995 when he left a message on Mr. Malone's voice mail. Claimant missed work on January 30, 1995 but returned to work on January 31, 1995 and worked until February 23, 1995 when, according to his testimony, he no longer could perform his work activities because of the pain and discomfort of his injuries. The respondent terminated the claimant's employment

in a letter dated March 9, 1995 for not notifying the respondent the reason for being absent from work.

Claimant did not receive any medical treatment for his alleged injuries until August 8, 1995. He had contacted Dr. Steven Quade, a chiropractor in Overland Park, Kansas, on March 1, 1995 but did not receive treatment from him at that time. Claimant did receive unemployment compensation from June of 1995 through the middle of October 1995. Claimant admitted that he had not asked respondent to provide medical treatment. Respondent introduced into evidence six letters from claimant complaining of problems related to his termination; none of the letters mentioned a work-related injury or requested medical treatment.

Troy Malone, claimant's supervisor, testified and denied that claimant had notified him that he had been injured when he was carrying the crate on January 29, 1995. Mr. Malone also testified that claimant had left a message on his voice mail on January 30, 1995, but that message had indicated that the claimant had a tension headache and was going to try to come into work at a later time. Mr. Malone established that claimant was terminated because he was absent from work from February 29, 1995 through March 7, 1995 without notifying respondent as to the reason for the absence. Mr. Malone testified the first he knew claimant was making a claim for a work-related injury was when he attended the unemployment hearing involving the claimant on August 3, 1995.

In this case, both the claimant and the respondent's representative, Troy Malone, claimant's supervisor, testified in person before the Administrative Law Judge. Thus, the Administrative Law Judge had the opportunity to personally assess the credibility of both of the witnesses. The Administrative Law Judge denied claimant's request for preliminary benefits finding the claimant failed to prove that he gave notice of his work-related accident of January 29, 1995 until August of 1995. K.S.A. 44-520 requires the claimant to give notice of an accident within 10 days or establish just cause within 75 days from the date of accident for not giving the 10-day notice. The Administrative Law Judge having found the notice of accident was not given until August of 1995, which is in excess of 75 days, denied claimant's claim for preliminary workers compensation benefits. The Appeals Board affirms the Administrative Law Judge's Order, deferring to the Administrative Law Judge as he was able to personally observe the credibility of the witnesses.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Alvin E. Witwer dated October 24, 1995, should be, and hereby is, affirmed in all respects.

| IT IS SO ORDERED.               |
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| Dated this day of January 1996. |
|                                 |
| BOARD MEMBER                    |
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| BOARD MEMBER                    |

# BOARD MEMBER

c: J. Burke Pollack, Tustin, CA Bill W. Richerson, Kansas City, MO Alvin E. Witwer, Administrative Law Judge Philip S. Harness, Director